

No. 83-1614

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SUE GOTTFRIED and MARCELLA M. MEYER for themselves
and on behalf of the deaf and hearing impaired popula-
tion within the Greater Los Angeles area,

Petitioners,
v.

UNITED STATES OF AMERICA; DEPARTMENTS OF HEALTH,
EDUCATION AND WELFARE; EDUCATION; AND JUSTICE;
FEDERAL COMMUNICATIONS COMMISSION; AND COMMU-
NITY TELEVISION OF SOUTHERN CALIFORNIA dba KCET-
TV,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF FOR RESPONDENT COMMUNITY TELEVISION
OF SOUTHERN CALIFORNIA IN OPPOSITION**

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STATEMENT OF THE CASE

This case is based on petitioners' allegations that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, requires a Los Angeles noncommercial educational (public) television station, Community Television of Southern California ("KCET"), to provide open captions on every program that it broadcasts. Petitioners' Appendix

("Pet. App.") at 3.¹ Only last term, in *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 103 S.Ct. 885 (1983), this Court considered related allegations brought by the same petitioners against KCET and the Federal Communications Commission ("FCC") and resolved that case in favor of KCET and the FCC.² In the instant case, petitioners again contend, *inter alia*, that KCET's service to the hearing impaired violates Section 504. The district court dismissed that claim, finding at the close of petitioners' case-in-chief that they had failed to prove that KCET violated that provision. (Pet. App. at 40). The court of appeals upheld that dismissal. (Pet. App. at 5).

The complex and prolonged history of this case is set forth in the opinion of the court of appeals (Pet. App. at 2-6) and KCET will not repeat it at length here. Briefly, petitioners' ³ initial complaint was filed against KCET, two of its officers, the Corporation for Public Broadcasting ("CPB"), the Public Broadcasting Service ("PBS"), the FCC and the Department of Health, Education and Welfare ("HEW").⁴ After HEW was re-

¹ Open captioning is subtitling that is visible on all television sets. "Closed captioning" is captioning that is visible only on television sets equipped with decoders. See Pet. App. at 1-2.

² The question before the Court in that case was "whether § 504 of the Rehabilitation Act of 1973 requires the Federal Communications Commission to review a public television station's license renewal application under a different standard than it applies to a commercial licensee's renewal application." *Community Television of Southern California v. Gottfried*, 459 U.S. 498, —, 103 S.Ct. 885, 887 (footnote omitted). The Court held that it does not. *Id.*

³ One of the original complainants, the Greater Los Angeles Council on Deafness, Inc., was dismissed for lack of standing, and did not appeal that dismissal.

⁴ During the course of these proceedings, the claims against the individual defendants were dismissed as those individuals terminated their relationship with KCET. Minute Order, June 15, 1981 (dismissing William J. Lamb); Minute Order, October 19,

structured in 1980, the Department of Education was substituted for HEW. (See Notice of Substitution of Parties, May 19, 1980). Subsequently, petitioners added the Department of Health and Human Services and the Attorney General as defendants. (See Order, September 1, 1981).

As regards KCET, petitioners alleged that it had "intentionally" "conspired" to deprive the hearing impaired of their rights under Section 504 by broadcasting most programs "with audibles (sound) only" and that the programming that was captioned or signed was broadcast at "grossly inconvenient hours." (Complaint at pp. 9, 10.) Petitioners requested the district court to enjoin KCET from broadcasting any programs that were not open captioned and also sought compensatory and punitive damages. (*Id.* at 10-12).

At trial, petitioners' case consisted of the testimony of ten witnesses, seven of whom were hearing impaired individuals who testified as to the difficulties they experienced in watching television and their desire for more visually assisted programs. The other three witnesses were KCET employees who testified about KCET's efforts to serve the deaf.⁵ After the close of petitioners' case, all the defendants moved for dismissal under Fed. R. Civ. P. 41(b). Although the district court noted, "Mr. Gottfried, you . . . have raised more questions than you have answered in your case" (transcript of February 13 and 14, 1980, p. 254), it did not rule on those motions at that time. Instead, taking a suggestion which HEW made in connection with the motions of KCET, CPB and

1981 (dismissing James L. Loper). Petitioners' claims against CPB and PBS were dismissed by the district court at the same time that it dismissed the claims against KCET. Pet. App. at 38-45. The court of appeals upheld those dismissals, Pet. App. at 10-11, and petitioners have not sought review here of those actions.

⁵ Transcript of February 13 and 14, 1980, pp. 18-63, 86-102, 107-157, 178-196, 244-247.

PBS for summary judgment,⁶ the district court remanded the case to HEW to develop compliance standards for public television under Section 504. (Pet. App. at 4, 13-14).

In August 1981, the Department of Education informed the Court that it had decided not to adopt regulations specifying the obligations of public television licensees to the hearing impaired, but rather would deal with questions as to whether a public television station was complying with Section 504 on a case-by-case basis.⁷ Upon being so informed, the district court ordered that trial resume that Fall. In September, prior to the resumption of the trial, KCET, CPB and PBS renewed their Rule 41(b) motions. The district court granted those motions, holding that petitioners had failed to prove that KCET, CPB and PBS had violated Section 504. (Pet. App. at 5, 38-45). Those holdings were affirmed by the court of appeals.

ARGUMENT

This case does not warrant review by this Court. First, the conclusion of the lower courts that respondent KCET did not violate Section 504 is fully consistent with the prior decisions of this Court and this case does not raise any novel or significant issues which require consideration by this Court. Second, the record clearly demonstrates that KCET has been responsive to the concerns of the hearing impaired and that the essence of petitioners' concern is a desire that KCET do more. Grant of that relief will, under this Court's decision in *South-*

⁶ See Pet. App. at 52-67.

⁷ At the same time, the Department advised the Court that it had dismissed Petitioner Gottfried's complaint against KCET. Gottfried had filed that complaint prior to instituting this action, alleging that KCET's failure to caption its programming violated Section 504. In August 1981, the Department of Education informed the Court that it had concluded that Gottfried's complaint was without merit. Pet. App. at 5, n.5.

eastern Community College v. Davis, 442 U.S. 397 (1979), require the district courts to resolve complex technical, economic, and programming issues. As this Court noted in *Davis, id.* at 413, these are the types of issues which administrative agencies are uniquely situated to resolve. The lower courts' action preserves the ability of those agencies to resolve these issues while avoiding the necessity for the district courts to deal with them.

I. The Courts Below Correctly Held That KCET Did Not Violate Section 504

The district court and the court of appeals were correct in finding that KCET did not violate Section 504. In *Southeastern Community College v. Davis, supra*, this Court explicitly held that "neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds." 442 U.S. at 411. Rather, Section 504 only prohibits discrimination, and thus a successful claim under that section must demonstrate that the defendants intentionally discriminated against handicapped individuals. In the absence of such "animus against handicapped individuals", the claim must fail. *Id.* at 413. *Accord Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402, 1409-1410 (5th Cir. 1983); *American Public Transit Ass'n v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981). *Cf. Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71 (1st Cir. 1981); *Upshur v. Love*, 474 F.Supp. 332, 342 (N.D. Cal. 1979). Nothing in the record in this case supports the notion that KCET has intentionally discriminated against the hearing impaired.

Further, as both the lower courts recognized, making television programming accessible to the hearing impaired would require that KCET undertake affirmative steps to alter its programming. As the court of appeals noted, television broadcasting is composed of both visible and

audible components, and persons with hearing impairments have a diminished ability to receive the audible components. (Pet. App. at 11). Thus, the court of appeals properly found:

... some sort of affirmative modification of normal television broadcasting is required in order to compensate for the deaf and hearing-impaired viewers' inability to receive the audio portion. In applying the *Davis* analysis to this situation, the district court has correctly concluded that the private defendants did not violate Section 504 by failing to take affirmative action to caption or sign all of the programs broadcast.

(Pet. App. at 11).⁸

While petitioners contend that dicta in *Davis* indicates that, in appropriate circumstances, a defendant's refusal to make modifications in federally-assisted programs might constitute discrimination, it is clear from that decision that the Court was referring to minor adjustments. Thus, it stated:

It is possible to envision situations where an insistence on continuing past . . . practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of those goals without imposing undue financial or administrative burdens Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.

Id. at 412-13. Since the Court found the adjustment required to accommodate the plaintiff in that case to be

⁸ It should also be noted that Section 504 applies only where a handicapped individual is "able to meet all of a program's requirements in spite of his handicap." *Davis, supra* at 406. As such, it is questionable whether petitioners satisfy that threshold test.

"major", it held that the defendant was not required to make the "substantial modifications" necessary to accommodate her handicap.

The types of modifications petitioners seek here involve the same types of "major adjustments" and "fundamental alterations". Indeed, open captions fundamentally alter the visual component of television programming. Moreover, such affirmative changes would be extraordinarily expensive. The trial record indicates that KCET would have to spend at least \$2.8 million, or 20% of its FY 1978 budget, to caption its programming. See Declaration of Dr. James L. Loper, Sept. 28, 1979, ¶ 20.⁹

Nothing in Section 504 imposes such substantial financial burdens on recipients of federal assistance. *Davis, supra*, at 412.¹⁰ Indeed, requiring KCET to caption all its programs would materially impair, if not preclude, its ability to achieve the very services to its general audience for which Congress provided the funds to public broadcasting in the first instance. Clearly then, Section 504 does not require that KCET devote the resources necessary to caption its programming for the hearing impaired.¹¹

⁹ Of course, KCET would not be the only public television station affected by such a requirement and the system-wide costs would be vastly greater.

¹⁰ In an analogous situation, this Court observed, "When Congress does impose affirmative action obligations on the States, it usually makes a far more substantial contribution to defray costs. . . . It defies common sense, in short, to suppose that Congress implicitly imposed this massive obligation. . . ." *Pennhurst State School v. Halderman*, 451 U.S. 1, 24 (1981), *on remand*, 673 F.2d 647 (3d Cir.), *reversed and remanded*, 104 S. Ct. 900 (1984).

¹¹ Because Section 504 does not require KCET to caption its programming, the Court need not address the petitioners' sixth issue, i.e., whether this Court's decision in *Grove City College v. Bell*, 104 S.Ct. 1211 (1984), requires that Section 504 apply to all

II. The Court of Appeals' Action Avoids Imposing Onerous And Unnecessary Burdens On The Lower Courts

The record in this case demonstrates that KCET has been sensitive to the concerns of the hearing impaired in the Los Angeles area. Notwithstanding petitioners' protestations, KCET has presented a substantial amount of programming which was captioned, signed, or otherwise made available to those with hearing handicaps.¹² Given KCET's efforts to serve petitioners, interpreting Section 504 as imposing some affirmative obligation on public television licensees will require the district court to determine whether those efforts are sufficient, or whether, as petitioners contend, more is required.

That will require the court to resolve extremely complex technical, economic and programming issues. The process of making television programming accessible to the hearing impaired involves many trade-offs related to costs, interference with the visual portion of the program,

of KCET's activities or to only those financed by the direct receipt of federal funds.

In all events, however, petitioners' reliance on *Grove City College* is misplaced. The court of appeals did not hold, as petitioners seem to indicate, that Section 504 does not apply to the activities of a public television station which are funded under a general, unrestricted grant. All the court of appeals held was that where public television stations receive program-specific grants, as in the case of funding by the Department of Education, Section 504's obligations attach to the specific program for which assistance was provided. That holding is fully consistent with the decision in *Grove City College*.

¹² At the time of trial (February 1980), 13% of KCET's total broadcast time was captioned or signed. Transcript of February 13 and 14, 1980, p. 196. During fiscal year ("FY") 1979, KCET presented more than 600 hours of programming that was captioned, subtitled or signed, an increase of approximately 100 hours over the amount of such programming that KCET broadcast during FY 1978. *Id.*, pp. 178-180. A lack of technical equipment and adequate funding prevented KCET from broadcasting more captioned, subtitled or signed programming. *Id.* at p. 191.

time delays to permit the captioning and other similar issues. In addition, there is still a substantial debate as to the best technical vehicle for captioning programming and whether teletext, or the existing Line 21 system, offers the best hope for making captioned programming widely available.¹³

However, district courts are ill-equipped to handle these complex, technical issues. As this Court noted in *Davis*, "identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of . . . [the appropriate funding agencies]." *Davis, supra* at 413. Those agencies have the expertise and resources to deal with these issues and, through the notice and comments procedures of the Administrative Procedure Act, can solicit the views of a wide range of interested parties. District courts, on the other hand, lack that data gathering ability and are limited to the record developed in the course of a single trial.¹⁴

By interpreting Section 504 as it did, the court of appeals avoided entwining the district courts in these types of issues, while leaving the administrative agencies free to respond to changes made possible by advancing technology. This Court should not upset that result.

¹³ See *Authorization of Teletext*, 53 P&F Rad. Reg. 2d 1309 (1983); *Captioning for the Deaf*, 63 F.C.C.2d 378 (1976). "Teletext Still Better", *Communications Daily*, Vol. 4, No. 45, p. 3 (March 6, 1984).

¹⁴ Administrative interpretation also permits even-handed treatment of all public television licensees, rather than imposing substantial new and onerous burdens on a single licensee. Cf. *Community Television of Southern California v. Gottfried, supra*, 459 U.S. at 498, 103 S. Ct. at 893 [industry-wide rulemaking is generally a "better, fairer, more effective" way of proceeding].

Accordingly, grant of certiorari in this case is inappropriate. The lower courts properly applied this Court's decisions in resolving the issues upon which petitioners seek review and this case presents no novel issues which warrant this Court's consideration. The district court made a finding of fact, at the close of petitioners' case, that petitioners had not proved that KCET had violated Section 504. The court of appeals upheld that finding. No further consideration of that issue is required.

CONCLUSION

For the reasons set forth above, the requested petition for a writ of certiorari regarding respondent Community Television of Southern California should be denied.

Respectfully submitted,

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